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# Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 350.

THE BASSICK MANUFACTURING COMPANY, *Petitioner*,

v.

THE UNITED STATES.

No. 351.

F. W. STEWART MANUFACTURING CORPORATION, *Petitioner*,

v.

THE UNITED STATES.

No. 352.

GEMCO MANUFACTURING COMPANY, *Petitioner*,

v.

THE UNITED STATES.

## *BRIEF FOR PETITIONERS.*

## STATEMENT OF THE CASES.

DECISIONS OF THE LOWER COURT.

GEORGE M. WILMETH,
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Washington, D. C.,
December 23, 1929.

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## *BRIEF FOR PETITIONERS.*

## STATEMENT OF THE CASES.

### DECISIONS OF THE LOWER COURT.

The opinions of the Court of Claims in the above-entitled cases have not yet been reported. They are to be found, however, in the records of the several cases as follows: The Bessick Manufacturing Company (No. 350), page 14; F. W. Stewart Manufacturing Corporation (No. 351), page 12; Gemco Manufacturing Company (No. 352), page 9. For the sake of brevity the several cases will be hereinafter designated or referred to as the Bassick case (No. 350), the Stewart case (No. 351), and the Gemco case (No. 352).

## The Statutes.

Section 900 of the Revenue Act of 1918 (40 Stats. 1122), provided:

> That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—
>
> (1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;
>
> (2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), excepting tractors, 5 per centum;
>
> (3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum.

Section 900 of the Revenue Act of 1921 (42 Stat. 227, 291), re-enacted or continued in force without change effective from and after January 1, 1922, the taxes imposed by Section 900 of the Revenue Act of 1918, *supra*, and Section 600 of the Revenue Act of 1924 (43 Stats. 227, 322), is in substance the same, except that the rate of tax was reduced.

All of the taxes involved in the above-entitled cases were levied, assessed, and collected under subdivisions (3) of Sections 900 and 600 of the respective Acts on the theory that the articles taxed were parts or accessories for automobile trucks, automobile wagons, other automobiles, and motorcycles.

## The Articles Involved.

The taxes collected from and paid by the Bassick Company (No. 350) were assessed and collected on sales of an artic

designated and known commercially as a gascolator, which is gasoline filter or strainer. It is an accessory for a gasoline engine or motor. The use of this article is not limited or restricted to engines or motors used on automobiles, nor is it essential to their operation. On the contrary, it is adaptable for use and is used generally on or in connection with gasoline engines used to operate motor boats, airplanes, and all kinds of industrial and agricultural machinery (Special Finding of Fact No. III, R. 10).

In the case of the Stewart Company (No. 351) the taxes were imposed and collected on sales of certain repair or replacement parts (viz: gears, flexible drive chains, and drive chain housings) for automobile speedometers. This company does not manufacture or sell complete automobile speedometers (Special Finding of Fact No. II, R. 11).

The taxes involved in the Gemco case (No. 352) were assessed and collected on sales of repair or replacement parts for automobile bumpers. The company manufactures and sells not only complete bumpers, but also replacement parts therefor, such as bars, brackets, and fitting (Special Finding of Fact No. II, R. 8).

## Questions Presented.

First. Is an article (gascolator in this instance) which is adaptable for use and actually used on or in connection with various kinds of machines other than automobiles and motorcycles subject to the taxes imposed by subdivisions (3) of the sections of the Acts hereinbefore cited solely because such article may or can be used on or in connection with an automobile or motorcycle?

Second. Is the tax imposed by subdivision (3) of Sections 900 of the Revenue Acts of 1918 and 1921 and subdivision (3) of the Revenue Act of 1924, *supra*, applicable to sales of parts or accessories for articles enumerated in *subdivision (3)*, or only to sales of parts or accessories for articles enumerated in *subdivisions (1) and (2)*, as specifically stated by the taxing statutes?

Both of the questions stated are involved in the Bassick case (No. 350), whereas only the second question is presented in the Stewart (No. 351) and Gemco (No. 352) cases.

## Errors Assigned.

### I.

In the Bassick case (No. 350) the Court of Claims erred in finding and including in its Special Finding of Fact No. IV (R. 10-11) that—

> It does not appear from the evidence what, if any part of the taxes sought to be recovered herein were paid for gascolators sold to automobile manufacturers, or for uses other than for automobiles.

### II.

In each of the three cases the Court of Claims erred in deciding as a conclusion of law, upon its special findings of fact, that plaintiffs (petitioners here) were not entitled to recover and dismissing their petitions.

## The Contentions.

The petitioner's contention in the Bassick case (No. 350) is that the findings of the Court below, which are conclusive on this Court, establish the fact that gascolators are used principally or chiefly for other than automobile purposes.

The defendant contends that petitioner has failed to prove facts establishing the invalidity of the taxes sought to be recovered.

In the Stewart case (No. 351) and Gemco case (No. 352) petitioners contend that neither of the statutes under which the taxes involved were assessed and collected imposed any tax in respect of the sales of parts or accessories for articles enumerated in subdivision (3) of the applicable sections of said statutes.

The defendant urges that any article, *or any part therefor*, comes within the provisions of the Acts if adaptable for use on or in connection with an automobile.

## ARGUMENT.

The Bassick case (No. 350), which presents the primary question of whether a gascolator, or other article adaptable for various uses, is distinctively a part or accessory for an automobile, will be first discussed.

### I.

### THE RECORD SHOWS CONCLUSIVELY THAT THE PRINCIPAL OR CHIEF USES FOR THE GASCOLATORS MANUFACTURED AND SOLD BY PETITIONER ARE FOR OTHER THAN AUTOMOBILE PURPOSES.

In its Special Finding of Fact No. III (R. 10), the Court below found as follows:

> During the times hereinafter mentioned plaintiff was engaged in the business of manufacturing and selling gascolators (gasoline strainers).
>
> A gascolator is a device designed to be placed between the fuel tank and the carburetor of any internal combustion motor for the purpose of taking out dirt, water, grit, or any foreign matter from the gasoline before it gets to the carburetor, preventing the carburetor from becoming inoperative or not functioning properly. Gascolators were sold by plaintiff to and and used, during the period October 31, 1922, to March 31, 1926, by airplane, farm implement, automobile, and industrial machinery manufacturers. Said gascolators were adaptable for use on internal combustion engines, which are used to drive tractors, airplanes, industrial machinery, motor boats, marine boats, and automobiles, and were interchangeable on any combustion engine dependent on the size of the fuel pipe, and the adapter which is a device to connect the fuel pipe to the gascolator.

It is worthy of note that automobiles are only one of many different classes of machines mentioned by the Court as being operated by internal combustion engines on which the gascolator is used. It is submitted that this Court may properly take judicial notice of the fact that innumerable kinds of industrial machinery and farm implements, both of which are mentioned in the finding above quoted, are in daily use; so it is deemed unnecessary to burden the Court with an attempted enumeration of such machines and implements.

*1. This Finding of Fact Clearly Brings the Article under Consideration Within the Rule of Chief Use Adopted by this Court.*

This rule or principle is announced in *Magone* v. *Wiederer*, 159 U. S. 555. The question there involved was whether glass cut to certain sizes and shapes were "parts" of clocks. On this question the Court below charged the jury as follows:

> "In determining this question, whether or not these articles are parts of clocks, it will not be necessary for you to say that they were exclusively used for that purpose. An article may be chiefly used for a certain purpose and be diverted from its principal use; somebody may put it to a purpose for which it was not originally intended. That could not, in my judgment, change its tariff nomenclature. The Supreme Court, in a case which I think is somewhat similar upon the facts, although relating to different sections of the statute, sustained a charge to the jury 'that the use to which the articles were chiefly adapted and for which they were used determined their character within the meaning of the statute. * * *' And so I will say to you, as the law of the case, as I understand it, that if you find that these articles were chiefly used as parts of clocks, that that would determine their tariff classification. But it is entirely clear, upon the other hand, that they must be chiefly and principally used for that purpose. If they

> are articles, all, or one or more, as the case may be, which have no distinguishing characteristics, which are just as applicable for use in fancy boxes or in coach lamps as they are for clocks, just as applicable to the one use as to the other, then it would be entirely proper to say that they have no distinguishing characteristics as parts of clocks. They might be used for one purpose just as well as for another. And if you find as to those articles, or any of them, that they have several uses to which they are perfectly applicable, then as to those articles your verdict should be for the defendant."

This charge was sustained by this Court which in its opinion, delivered by Mr. Justice White, said:

> "The charge given by the court below, and which was excepted to, was manifestly correct, for in giving the rule of chief use the principles by which chief use was to be ascertained were fully stated exactly in accordance with the law subsequently announced by this court in *Magone* v. *Heller*. * * *"

The principle announced in *Magone* v. *Wiederer* was recognized and followed by the Court of Claims in *Atwater Kent Manufacturing Co.* v. *United States*, 62 C. Cls. 419. In that case the question was whether timers and coils for internal combustion engines were taxable under the very provisions of the Revenue Act of 1921 (Section 900 (3) ) under which a portion of the taxes here involved were assessed and collected. The Court of Claims having found as a matter of fact that timers and coils were adaptable for use on internal combustion engines other than those used for the operation of automobiles, held that plaintiff was entitled to recover. In the opinion of the court, delivered by Chief Justice Campbell, after quoting from *Magone* v. *Wiederer, supra*, it was held:

> "The principle is applicable here when we come to define the meaning of the word parts in the acts in question. Where the articles, as those we are con-

cerned with, are applicable for use in different kinds of machines or appliances and are just as applicable to the one use as to the other they are not distinctively parts of automobiles so as to be taxable under these statutes."

See also, to the same effect, *Milwaukee Motor Products, Inc.*, v. *United States*, 66 C. Cls. 295, *Wells Mfg. Co.* v. *United States*, 66 C. Cls. 283, and *Berg Bros. Mfg. Co.* v. *United States*, 67 C. Cls. 165.

The decision of the Court below in the Bassick case (No. 350) is in direct conflict with its decisions in the cases above cited. Timers and coils are essential to the operation of internal combustion engines whereas a gascolator is not. Therefore, there is added reason for the application of the sound principle followed by the Court of Claims in the *Atwater Kent* and other cases to the present case.

*2. No tax was imposed on the sale of parts and accessories to automobile manufacturers.*

The Court below in its Special Finding of Fact No. IV (R. 11) found that:

> "It does not appear from the evidence what, if any, part of the taxes sought to be recovered herein were paid for gascolators sold to automobile manufacturers, or for uses other than for automobiles."

It is manifest that the defendant relies upon this finding of fact to support its contention that petitioner has failed to sustain "the burden imposed upon it of showing that the taxes which it seeks to recover were imposed on nontaxable articles." (Brief in opposition to petition for writ of certiorari, p. 8.)

The answer to this, it seems to us, is simple, viz: The Acts under which the taxes in controversy were collected by defendant imposed no tax on sales of parts or accessories to automobile manufacturers. The pertinent provisions of the Acts are as follows (quoting from the Revenue Act of 1921):

"(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), *sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2)*, 5 per centum;" (Italics supplied.)

Since no tax was imposed on sales of parts or accessories to manufacturers or producers of articles enumerated in subdivision (1) or (2)—namely, automobiles and motorcycles—the necessary and inevitable inference resulting as a conclusion of law is that the taxes which petitioner seeks to recover were paid in respect of sales to others than automobile manufacturers. To hold otherwise would place upon the plaintiff (petitioner) the burden of proving a negative.

## II.

The second question for the determination of the Court involves a consideration of Sections 900(3) of the Revenue Acts of 1918 and 1921 and Section 600(3) of the Revenue Act of 1924, *supra;* That is to say, did these Acts impose any tax on sales of parts or accessories for articles enumerated in subdivision (3), or only on sales of parts or accessories for articles enumerated in subdivision (1) and (2) of the sections mentioned. The answer to this question will determine and dispose of the Stewart case (No. 351) and the Gemco case (No. 352). The Bassick case (No. 350) also presents the same question; but it is respectfully submitted that this question, in so far as the determination of the latter case is concerned, is secondary, to say the least, and that the reasons hereinbefore urged should be in themselves sufficient to sustain a reversal of the decision of the Court below. However, the Court is requested respectfully to give consideration to the arguments hereinafter advanced to the Bassick case (No. 350) as well as to the other cases (Nos. 351 and 352).

NEITHER SECTIONS 900 OF THE REVENUE ACTS OF 1918 AND 1921, NOR SECTION 600 OF THE ACT OF

1924, IMPOSED A SALES TAX ON PARTS OR ACCESSORIES FOR ARTICLES ENUMERATED IN SUBDIVISION (3) OF THE SECTIONS MENTIONED.

For the convenience of the Court Section 900 of the Revenue Act of 1918 (40 Stats. 1122) is again quoted (and it will be remembered that the provisions of subdivision (3) of this Act are identical with the corresponding subdivisions of the Acts of 1921 and 1924):

> That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased——
>
> (1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;
>
> (2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;
>
> (3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum: * * *

*1. What, Then, Are the Articles Enumerated in Subdivisions (1) and (2) of the Applicable Sections of the Acts Mentioned for which Parts or Accessories are Taxable?*

The answer to this question is to be found in the decision of the Court below in the case of *Martin Rocking Fifth Wheel Co.* v. *United States*, 60 C. Cls. 466, wherein the Court below, interpreting the same provision of the taxing statutes here involved, said:

> " 'Parts,' as used in that paragraph, are 'parts' *for* (italics ours) the articles enumerated in paragraphs (1) and (2), which are 'automobile trucks,' 'automo-

bile wagons,' 'other automobiles,' and 'motor cycles,' 'except tractors'."

The Court of Claims held, in the case of the *Auburn Rubber Co.* v. *The United States* (H-433), decided February 4, 1929, that blow-out patches and reliners for tires were not taxable as parts or accessories for articles enumerated in subdivision (1) or (2). Obviously, the only theory on which this decision can be based is that the products involved are not accessories for articles enumerated in subdivision (1) or (2), *but are accessories for tires, enumerated in subdivision* (3). Petitioner submits that if "accessories" for articles enumerated in subdivision (3) are not subject to the tax imposed by that subdivision, then it necessarily follows that "parts" for articles enumerated in subdivision (3) are nontaxable for the same reason.

In the case of the *National Rubber Filler Co.* v. *The United States*, 63 C. Cls. 337, the product, rubber filler for tires, was neither a part nor an accessory for any of the vehicles enumerated in subdivision (1) or (2). It was an accessory for a tire, enumerated in subdivision (3), and the Court of Claims held that it was not within the power of the Commissioner of Internal Revenue to extend the provisions of the taxing statute so as to bring such a product within its scope. In discussing the question of whether the words "parts" and "accessories" used in the taxing statutes could be properly construed to include the rubber filler involved, the Court said:

> "Beyond doubt the articles enumerated specifically in subdivision (3) of Section 900 have no common meaning. Otherwise it would have been unnecessary to specify. In similar revenue legislation the same course has been pursued by Congress, and articles subjected to taxation carefully enumerated specifically. Reference to an article by its fixed trade name was obviously not intended to reach another not so known or even so designated by the trade to which it is inseparably connected * * * Surely not every article used in con-

nection with a motor vehicle was intended to be taxed by the statute here involved. * * * Congress did not mention it in the statutes, and the doubt as to inclusion therein is made evident by the course of this proceeding."

*2. The Decisions of the Court Below in Effect Extends the Provisions of the Acts Beyond the Clear Import of the Language Used.*

No rule of statutory construction is more firmly established than the rule that in the interpretation of statutes levying taxes their provisions are not to be extended beyond the clear import of the language used. In *Gould* v. *Gould*, 245 U. S. 151, the Court said:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

And in *United States* v. *Merriam*, 263 U. S. 179, the Court said:

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms of expression. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer."

This rule was followed by the Court of Claims in the *Atwater Kent Manufacturing Co.* case, *supra;* but clearly its decisions in the instant cases runs counter to this settled principle of statutory construction.

The statutes here involved imposed taxes on sales of parts or accessories for articles enumerated in subdivisions (1) and (2) of Sections 900 and 600, namely, automobiles and motorcycles. A gascolator is not a part for any of the articles therein enumerated. It is an accessory which may be used on, but is not essential to, an engine used on an automobile. Such an engine is not enumerated in subdivisions (1) and (2), but falls within the provisions of subdivision (3) as a part for articles enumerated in the preceding subdivisions (1) and (2). Since no tax was imposed upon sale of parts or accessories for the articles enumerated in subdivision (3), the effect of the decision of the Court below is to extend the provisions of the Acts to embrace matters not specifically pointed out.

The use of the words "tires" and "inner tubes" in subdivision (3), in conjunction with the words "parts" or "accessories," would seem to prove conclusively that the term "articles enumerated in subdivisions (1) and (2)" was meant to refer only to the complete vehicles on which tires and inner tubes could be used. Manifestly, there could not be a tire or inner tube for a speedometer or bumper or any other accessory, but only for a truck, automobile or motorcycle.

## CONCLUSION.

For the reasons hereinbefore stated, it is respectfully submitted that the judgments of the Court of Claims were wrong. They should be reversed.

Respectfully submitted,

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Washington, D. C.,
December 23, 1929.